FOR ARGUMENT



No. 77-510

In the
Supreme Court of the United States
OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

*v.*

STATE OF NEW MEXICO, RESPONDENT

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO**

# BRIEF OF AMICI CURIAE,
The Twin Lakes Reservoir and Canal Company and The Southeastern Colorado Water Conservancy District

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## STATEMENT OF INTEREST

*Amici Curiae* Twin Lakes Reservoir and Canal Company ("Twin Lakes") and the Southeastern Colorado Water Conservancy District (the "District") submit this brief in support of the State of New Mexico with the consent of the parties.

Twin Lakes and the District are Colorado appropriators of water arising on the White River National Forest. Pursuant to Colorado court decrees, each *amicus* collects water at altitudes of 10,000 to 11,000 feet in the mountain headwaters of the Colorado River. The watersheds which they tap were set aside as national forests by the Executive Order of August 25, 1905. Through intricate networks of canals and tunnels their water is channelled beneath the

Continental Divide to the upper reaches of the Arkansas River Basin, and then released downstream to water users in the southeastern part of the state.

The lower Arkansas Valley receives annual average precipitation of less than nine inches; its water is more heavily appropriated than any other section of Colorado; and it suffers more acutely from water shortages than does any other region of the state. The United States reserved right claims for minimum stream flows aggravate this already desperate condition.

The *amici* are both privately and publicly funded. Twin Lakes is a private mutual ditch corporation. Stock ownership entitles each holder to receive a pro-rata share of the annual water supply. Its original stockholders consisted of small farmers in Crowley County, Colorado, who conceived and constructed the Independence Pass Transmountain Diversion System during the depths of the Great Depression. Work on this project began in 1930, and water first flowed beneath the Continental Divide in 1937. During a recent ten year period, the average annual water appropriation by Twin Lakes exceeded 50,000 acre feet. A significant portion of this water is collected in late summer, fall and the winter months, when stream flows at high altitudes are much diminished.

The District is a public entity organized under Colorado law for the conservation, development, and utilization of water for agricultural, municipal and industrial uses. It initiated and obtained priorities to the use of water dating from July 29, 1957. It has entered into a contract with the United States for the repayment of costs of the Fryingpan-Arkansas Project, a federal reclamation project authorized under Public Law 87-590, 43 U.S.C. §616 (1970). Operating principles approved by Congress and adopted pursuant to P.L. 87-590, *see* H.R. Doc. No. 130, 87th Cong., 2nd Sess. (1962), provide for specified quantities of "instream" flows at most collection points on the



White River National Forest. The Government's reserved rights claim for minimum stream flows exceeds the flows designated by the operating principles. The project is designed to divert approximately 69,000 acre feet of water a year from national forest lands.

Twin Lakes and the District are resisting the reserved rights claims of the United States in the Colorado litigation occasioned by the remands of this Court in *United States v. District Court in and for Eagle County,* 401 U.S. 520 (1971), and *United States v. District Court in and for Water Division No. 5,* 401 U.S. 527 (1971). Each has raised numerous defenses in opposition to the federal reserved rights claims, and each has submitted voluminous evidence showing that the United States is equitably estopped from impairing its water rights. After four years of evidentiary hearings, oral arguments and lengthy briefing, the Master-Referee issued his Report in the Colorado litigation in August, 1976. Among other determinations, he found and concluded that the national forests were not originally created for purposes which sustain federal claims for minimum stream flows, and that the doctrine of equitable estoppel does protect the water rights of the *amici.* The Master's Report in these respects has been approved and adopted by the Colorado District Court, by a decree dated March 6, 1978.

That case has not yet reached the Colorado Supreme Court, and Twin Lakes and the District find themselves in the unenviable position of seeking to protect their most vital interests through an *amici curiae* brief The *amici* are informed that others will seek to invoke the doctrine of equitable estoppel in this case. Twin Lakes and the District respectfully urge that no issues of equitable estoppel are properly before the Court, for there has been no evidentiary showing on the record of the bases for application of the doctrine. Any pronouncement on that principle must await a supporting record.

The claims of the United States for minimum stream flows pose a direct and fundamental threat to the continuing operations of the *amici*. Like thousands of other water appropriators in the West, they have located their headgates close to the source of streams in the national forests. The United States seeks to relate its claims for minimum stream flows to the date of the reservation of particular national forests, which, in the instance of the *amici,* precedes the priority dates of the water rights which they own. If minimum stream flow rights are recognized with a priority date of the date of the creation of the forest reserve, water users such as Twin Lakes and the District would be forced to relinquish sufficient water to facilitate flows through streams below their diversion facilities. The United States Forest Service has previously indicated that about 25,000 acre feet a year, which is half the water to which Twin Lakes is entitled by its Colorado decrees, would be required to maintain the "minimum" stream flows sought by the Government. The United States' claims also substantially exceed the instream flows approved by Congress for the District's project.

Twin Lakes and the District furnish water to numerous agricultural, municipal and industrial users in arid regions of Colorado. They represent the very beneficiaries of two fundamental purposes for which the national forests were created — to secure favorable conditions of water flows, see 16 U.S.C. § 475 (1976), and to further local appropriations under state law pursuant to 16 U.S.C. § 481 (1976). The antedated federal claim for minimum stream flows obliterates these express purposes and threatens the water rights and related economies of all who acted under these Congressional enactments. The New Mexico Supreme Court's decision properly rejected minimum stream flows as a reserved right relating back to the creation of the national forests. It should be affirmed.



## SUMMARY OF ARGUMENT

The implied reserved rights of the United States in the national forests are strictly limited to the amount of water necessary to fulfill the purposes for which the forests were created. See *Cappaert v. United States,* 426 U.S. 128, 141 (1976). The Creative Act of 1891, 16 U.S.C. § 471 (1976), the Organic Administration Act of 1897, 16 U.S.C. § 476, *et. seq.* (1976), related legislation, and administrative policies demonstrate that until 1960 these purposes consisted of the nurture of timber supplies and the protection of watersheds. They do not include the recreational and aesthetic purposes proposed by the United States to rationalize its claims for minimum stream flows. Reserved rights to implement recreational and aesthetic functions only arise with the passage of the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528 *et. seq.* (1976).

Consistant with its 1897 declaration of national forest purposes, Congress expressly granted the use of forest water to private and municipal users, such as Twin Lakes and the District. See 16 U.S.C. § 481 (1976). The Government's claim for reserved rights for minimum stream flows represents an effort to divest appropriators of Congressionally-sanctioned rights on the basis of an implied doctrine. The maintenance of minimum flows in national forest streams need not wreak such havoc. The United States enjoys the capacity to secure stream flows for the future through use of the right-of-way provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701, *et. seq.* (1970). It also retains the power to condemn existing water rights and pay just compensation to obtain sufficient water for its new objectives.

Reserved rights for minimum stream flows are also asserted by the Government to prevent fire and control erosion. These justifications lack plausibility. But more importantly, they lack any evidentiary support whatsoever in the record of this case. They should not be considered by the Court.

## ARGUMENT

### I. RESERVED RIGHTS FOR NATIONAL FORESTS ARE LIMITED TO THE WATER NECESSARY TO FULFILL THE PURPOSES SPECIFIED IN 16 U.S.C. § 475 AND THEY DO NOT INCLUDE WATER FOR THE RECREATIONAL AND AESTHETIC USES URGED BY THE GOVERNMENT.

Since its inception in *Winters v. United States,* 207 U.S. 564 (1908), the reserved rights doctrine has expanded beyond Indian lands to encompass all federal reservations of the public domain. In *Cappaert v. United States,* 426 U. S. 128 (1976), the Court held:

> . . . that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. 426 U.S. at 138.

Most importantly, the Court also cautioned that:

> The implied-reservation-of-water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more. 426 U.S. at 141.

There followed an exacting analysis to determine the minimum amount of water needed to meet the purpose for which the national monument in question was authorized.

Under the rule in *Cappaert,* the Government's reserved water rights in the national forests are defined and strictly limited by the purposes for which the forests were established. Until the passage of the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528 *et. seq.* (1976), these purposes were exclusively fixed by the Creative Act of March 3, 1891, 16 U.S.C. § 471 (1976), and the Organic



Administration Act of 1897, 16 U.S.C. § 475 *et. seq.* (1976). The forest purposes mandated therein by Congress consist of the nurture of timber supplies and the protection of watersheds to insure dependable water supplies for the arid areas outside the forests. The Creative Act and the Organic Act provide no support for the Government's claim that waters in the national forests are reserved for recreational or aesthetic purposes, or for the satisfaction of current environmental sensibilities. The legislative history of these Acts establishes that waters arising on the national forests were dedicated to the developing needs of the West. Only in 1960 did Congress alter the controlling statutes to add purposes which may sustain the claims of the United States. But the 1960 amendments cannot relate back or otherwise expand the purposes underlying the formation of national forests in prior years. New purposes first sanctioned in 1960 create only a reserved water right with a 1960 date.

#### A. *The Creative Act and the Organic Administration Act Formulated the Purposes Of The National Forest.*

Congress first authorized the establishment of national forests through the Creative Act of 1891.[1] The statute on its face did not resolve the purposes of the national forests. For the next six years forest reservations engendered a great

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[1] It stated (in pertinent part):

> The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof. 16 U.S.C. § 471 (1976). Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1103 (repealed 1976).

national controversy. In 1897 Congress set about to clarify the functions of the national forests by adopting a statement of "purposes for which national forests may be established and administered" as part of the Organic Administration Act. This provision reads in pertinent part:

> All public lands designated and reserved prior to June 4, 1897, by the President of the United States under the provisions of section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established except to *improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States;* but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes. (Emphasis added.) 16 U.S.C. § 475 (1976).

The Organic Act is a ringing declaration of purpose, setting the criteria for the creation and operation of all national forests. It also included a section specifically authorizing the use of:

> [a]ll waters within the boundaries of national forests . . . for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations thereunder. 16 U.S.C. § 481 (1976).



The national forest system, therefore, was designed to insure the proper maintenance of watersheds and the provision of ample timber; and it was also intended to facilitate the use of forest water by private appropriators, such as Twin Lakes and the District.

The United States here insists that the Organic Act sanctions an array of federal reserved water rights to the detriment of long-established nonfederal appropriators. Most damaging to water appropriators such as the *amici* are its claims for instream flows.[2] These flows are primarily pursued by the United States in order to promote fish and wildlife propagation and to enhance the aesthetic enjoyment of visitors to the national forests. But aesthetic appreciation, recreation, and fish and wildlife development represent functions which exceed the plain wording of the Creative and Organic Acts. Such purposes are further dispelled by the statutes' legislative history, which is a fundamental interpretative aid. *See Train v. Colo. Pub. Int. Research Group,* 426 U.S. 1, 9-11 (1976).

The provision authorizing creation of national forests was passed as § 24 of the Act of March 3, 1891, entitled "An Act to repeal the timber-culture laws, and for other purposes." The timber-culture statutes were regarded as ineffectual pieces of legislation and, in some instances, as open invitations to defraud the Government. *See* 21 Cong. Rec. 2537, 51st Cong., 1st Sess. (1890). At the same time, con-

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[2] In this case the federal government characterized its instream claims as "minimum" stream flow claims. In the pending Colorado litigation referred to in the Statement of Interest above, the United States has described this claim as one for "adequate" stream flows. In similar Idaho reserved rights litigation, the federal claim for instream flows has been pushed to the ultimate. There the Forest Service asserts that *all* waters in particular streams flowing through the national forest are reserved by the United States. See *Avondale Irrigation District v. North Idaho Properties, Inc.,* Supreme Court of Idaho, decided March 15, 1978, Case No. 12174.

cern about sustained timber yields and control of water supplies impelled Congress to establish the national forests. Action was urged to:

> . . . secure the magnificent forests upon these lands from destruction by axe and flame within a comparatively short period . . . . They will be needed as an important source of timber supply for the Western States for all time to come . . . . The greatest value of these forests to the present and future inhabitants of the Western States is in the assistance they render to agriculture through their influences on the water supply and the climate . . . . there is absolutely nothing, natural or artificial, that will take the place of the mountain forest as a regulator of rain-fall and water supply." *See* Memorial of the American Forestry Association, 21 Cong. Rec. 2537-38 (1890).

In the course of Congressional debate, Representative Flower of New York elaborated on the objectives of the statute as follows:

> The more you preserve the timber at the headwaters . . . . the better you will be able to restrain the floods at its mouth and along its banks, and the better you will be able to protect the property of the people living in its fertile valleys.
>
> . . . . These streams someday or other will be diverted from their beds for irrigation purposes, and will make fertile the lands in the Rockies and the Nevadas, besides which it will prevent a great deal of the suffering from overflows.
>
> The more careful the preservation of the timber at the fountain heads of the stream the better it will be for the West and South and for the people who live in the valleys through which these great rivers flow.



> . . . . Now, Mr. Speaker, I think that the man who cuts trees on the headwaters of these streams in such a way as to seriously diminish the timber commits a crime against the Western farmer. 22 Cong. Rec. 3616 (1891).

By 1897 approximately 17 million acres had been set aside as national forests. *See* 30 Cong. Rec. 908, 919 (1897). In 1896 the Secretary of the Interior in conjunction with the National Academy of Sciences appointed a blue-ribbon committee of scientists to examine the national forests and recommend changes in policy. This action reflected apprehension that the national forests were insufficiently attended by the Federal Government and consequently suffered from uncontrolled fires, grazing, and timber cutting. *See* The Report of a Committee Appointed by the National Academy of Sciences Upon the Inauguration of a Forest Policy for the Forested Lands of the United States to the Secretary of the Interior, S. Doc. No. 105, 55th Cong., 1st Sess. (1897). The Committee recommended, among other proposals, that the President reserve an additional 21 million acres in Wyoming, Utah, Montana, Washington, Idaho, and South Dakota. On February 22, 1897, President Cleveland issued an executive order reserving the land designated by the Committee. *See* 30 Cong. Rec. 900 (1897). These reservations provoked vehement outcries from Western Congressmen, who protested that the boundaries were drawn indiscriminately, and that the livelihoods of thousands of settlers within the new reservations were imperilled. *See* 30 Cong. Rec. 900-902, 908-912 (1897).

Congress reacted by suspending the President's executive order of February 22, 1897, by defining the purposes for which the forests could be reserved, and by adopting a charter for forest management and economic uses within the forests.[3] Hence, the statement of purposes, 16 U.S.C. §

[3] See generally G. Pinchot, *A Primer of Forestry*, at 85-87 (1905); J. Ise, *The United States Forest Policy*, at 130-38 (1972).

475 (1976), was the centerpiece of a comprehensive design to regulate all national forests. In order to respect the Congressional temper, it must be read as a restriction of implied federal prerogatives.

The Congressional debates and Committee reports indicate that Congress conceived the national forest system as a means to protect timber and to conserve the capacity of watershed lands to produce a steady supply of water. Thus, Senator White, from California, remarked:

> We are interested, as Senators have said, in the preservation of the forests; we are interested in conserving the water supply. 30 Cong. Rec. 917 (1897).

Representative McRae from Arkansas, one of the authors and principal sponsors of the 1897 Act, expanded at length upon the need for national forests:

> Common sense and science, I think, will agree that the forest cover will hold both the rainfall and melting snow, so they will not rush to the streams in torrents in the spring and early summer. We all know that in a well-timbered country the water goes more gradually into the streams and gives a steadier flow, with fewer overflows and less low water.
>
> As long as the forests stand, the branches, fallen leaves, and roots will hold much of the rain and snow until summer, and thus furnish water not only for navigation of our rivers, but also for the irrigation of the deserts.
>
> . . . .
>
> *The objects for which the forest reservation should be made are the protection of the forest growth against destruction by fire and axe and preservation of forest conditions upon which water conditions and water flow are dependent. The purpose, therefore, of this bill is to maintain favorable forest conditions, without excluding the use of these reservations for other purposes. They are not parks set aside for nonuse, but have been established for economic reasons.*
>
> It is therefore necessary to prescribe the manner and method by which the timber growing thereon, the mineral contained therein, the water power furnished by them, and the pasturage within the same shall be used, so as not to injure or destroy the primary objects for which they are established . . . . (Emphasis added) 30 Cong. Rec. 966 (1897).



Thus, one of the architects of the Act discarded the notion that the national forests were "parks"; rather, he invited their controlled use for economic purposes. His outlook belies the claim that the national forests were created for recreational objectives.

Representative Ellis from Oregon emphasized[4] the function of national forests in furnishing supplies of water to cities and other users:

> They [the people of the West] believe in setting apart reasonable reservations near the head waters of the streams, if you please, especially such as afford water supplies to cities, if there be any such . . . .

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[4] Representative Ellis' remarks were amplified in the same session by Representative Loud from California, who stated:

> . . . I want to say further that the only object of the forest reserves in the State of California is to retain the snows upon the mountains, so that the snows and rains of the spring shall not bring down all at once the full flood upon our valleys, where irrigation is carried on to a great extent and where it is a necessity, as it is for the production of the crops of the great San Joaquin Valley.
>
> That is the main object of the forest reserves in the State of California. . . . 30 Cong. Rec. 1399 (1897).

> . . . as was well remarked by the gentleman from Colorado [Mr. Bell] yesterday, the purpose of these forest reservations is not to save the timber for future use so much as to preserve the water supply.
>
> . . . .
>
> I take it, Mr. Chairman, that these reservations of forests and the setting them apart are for the purpose of preserving the merchantable timber; but that is not the real object. It is for the preservation of the water supply. 30 Cong. Rec. 1006-07 (1897).

The Report of the Committee upon the Inauguration of the Forest Policy, S. Doc. No. 105, 55th Cong., 1st Sess. (1897) — which aroused bitter controversy and inadvertently precipitated the Organic Act — articulated these same themes. The Report dwelled on the national forests as sources of timber and as geographical features affecting climates, soils, and water supplies. For instance, it said:

> . . . But a well-regulated water supply is not the only thing dependent on the preservation of forests. In civilized nations the demand for lumber and other forest products is continuous, and requires systematic and intelligent forest reproduction. p. 10.

> Your committee is of the opinion that it is not only desirable but essential to national welfare to protect the forested lands of the public domain, for their influence on the flow of streams and to supply timber and other forest products . . . . p. 36.

> It is the opinion of your committee that, while forests probably do not increase the precipitation of moisture in any broad and general way, they are necessary to prevent destructive spring floods, and corresponding periods of low water in summer and autumn when the agriculture of a large part of Western North America is dependent upon irrigation. p. 36.



The Report further proposed "granting rights-of-way for irrigating ditches, flumes, and pipes, and for reservoir sites. . . ." p. 36.

What Congress did not enact is as instructive as what it did. The Organic Act represented a comprehensive rubric for the governance of the national forests. It included sections which controlled the removal of timber and stone from the national forests, see 16 U.S.C. § 477 (1976), and the ingress and egress of settlers and others, and which permitted any person to enter the national forests "for all proper and lawful purposes, including that of prospecting, locating and developing the mineral resources thereof." *See* 16 U.S.C. § 478 (1976). It specifically authorizes lumbering, water appropriations, road construction, firewood gathering, prospecting, mining and domestic functions. *See* 16 U.S.C. § 477 (1976). Yet the 1897 Act is completely devoid of any references to wildlife, recreational or aesthetic purposes.

The Congressional debates and Committee reports on the Organic Act also stand completely mute about recreational uses of the national forests. *See e.g.*, 30 Cong. Rec. p. 908, 917, 966, 1006, 1007, 1397-1401 (1897); S. Doc. No. 105, 55th Cong. 1st Sess. (1897). The Report of the Committee upon the Inauguration of the Forest Policy, which urged an enormous expansion of the national forest system, also contained no mention of this subject. This absence demonstrates that Congress did not intend to establish the national forests to serve wildlife, recreational or aesthetic purposes. Without Congressional mandate for such purposes, there can be no companion reserved water right.

B. *Other National Forest Legislation Affirms The National Forest Purposes as Protection of Timber and Preservation of Watersheds*

Subsequent Congressional actions confirm the economic utilization of forest resources as the purpose of the national forest system. The Transfer Act of 1905, Act of February 1, 1905, 33 Stat. 628, shifting control of the national forests from the Interior to the Agriculture Department, was accomplished, because, in the view of the Secretary of the Interior, "Forestry, dealing as it does with a source of wealth produced by the soil, is properly an agricultural subject." H.R. Rep. No. 48, 58th Cong., 2d Sess. 2 (1903). On the date of the statute's enactment, the Agriculture Secretary wrote to the Chief Forester:

> You will see to it that the water, wood, and forage of the reserves are conserved and wisely used for the benefit of the home builder first of all; upon whom depends the best permanent use of lands and resources alike. The continued prosperity of the agricultural, lumbering, mining, and livestock interests is directly dependent upon a permanent and accessible supply of water, wood, and forage, as well as upon the present and future uses of these resources under businesslike regulations, enforced with promptness, effectiveness, and common sense. In the management of each reserve, local questions will be decided upon local grounds; the *dominant industry* will be considered first but with as little restriction to *minor* industries as may be possible; sudden changes in industrial conditions will be avoided by gradual adjustment after due notice; and where conflicting interests must be reconciled, the question will always be decided from the standpoint of the greatest good of the greatest number in the long run. *See* Hearings on H.R. 10572 Before the Sub-



comm. on Forests of the House Comm. on Agriculture, 86th Cong., 2d Sess. 69-70 (1960).

In 1911 Congress passed the Weeks Act, 16 U.S.C. 513 *et. seq.* (1976), which authorized the purchase of private land in the East and its inclusion in national forests when necessary to protect the watersheds of navigable rivers from clear-cutting and flooding. The Weeks Act was expanded in 1924[5] to allow land to be purchased and added to national forests for the promotion of timber production, or the protection of watersheds important to navigation or *irrigation*. These statutes clearly reflect Congress' conception of the national forests as enclaves of practical, economic significance.

Even now, subsequent to passage of the Multiple Use Act of 1960, 16 U.S.C. § 528 *et. seq.* (1976), national forests cannot be founded or operated solely for recreational or wildlife purposes. The Multiple Use Act, while expressly validating additional purposes for the national forests, also emphasized their subordination to the original objects of the forest reserves. The House Committee Report explained:

> . . . the national forests are established and shall be administered for the purposes enumerated . . . as supplemental to, but not in derogation of, the purposes of improving and protecting the forests or for securing favorable conditions of water flows and to furnish a continuous supply of timber as set out in

[5] Act of June 7, 1924, 43 Stat. 654-55, 16 U.S.C. § 569-70 (1976). The Weeks Act was designed to permit purchase of land solely for the protection of the watersheds of navigable rivers. *See e.g.*, 46 Cong. Rec. 2574-2602, particularly 2595 (1911). The 1924 legislation amended the statute to allow purchase of land around the watersheds of streams used for navigation or irrigation, and also purchase of productive timber land. It further provided under certain conditions that public lands endowed with these characteristics could be set apart and added to national forests. *See e.g.*, H.R. Rep. No. 439, 68th Cong., 1st Sess., 2, 4, 6, 8 (1924); See also 65 Cong. Rec. 6501-14, 6977-89, 10954-59, (1924).

the cited provision of the act of June 4, 1897. Thus, in any establishment of a national forest a purpose set out in the 1897 act must be present but there may also exist one or more of the additional purposes listed in the bill. *In other words, a national forest could not be established just for the purpose of outdoor recreation, range, or wildlife and fish purposes,* but such purposes could be a reason for the establishment of the forest it [sic] there also were one or more of the purposes of improving and protecting the forest, securing favorable conditions of water flows, or to furnish a continuous supply of timber as set out in the 1897 act. (Emphasis added.) H.R. Rep. No. 1551 or H.R. Report No. 10572, 86th Cong., 2nd Sess. 4 (1960).

To this date, then, recreation and wildlife development are not purposes that will sustain by themselves the formation of a national forest. The Multiple Use Act also indicates that a national forest set aside at the current time would not be entitled to reserved water for recreation, wildlife and fish propogation in derogation of what is reasonably required to serve watershed protection needs.

### C. *National Park Legislation Affirms National Forest Purposes As Protection of Timber and Preservation of Watersheds*

Since 1872,[6] the United States has pursued a policy of reserving federal lands containing particular recreational or scenic value as national parks. This policy, and the distinction which Congress maintained between the purposes of the national parks and the forests, demonstrate the absence of any Congressional intent to reserve water for recreational and allied activities in national forests.

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[6] Yellowstone National Park was established by Act of March 1, 1872, ch.24. § 1, 17 Stat. 32.



In 1897, the above-mentioned Report of the Committee upon the Inauguration of the Forest Policy recommended that parts of two forest reserves containing "features of supreme natural beauty . . . be preserved for the enjoyment and instruction of the world by creating them national parks . . . ." S. Doc. 105, 55th Cong., 1st Sess. 35 (1897). Such an approach was indeed followed. Up to 1916, when the national park service was authorized, *See* 16 U.S.C. § 1 *et. seq.* (1976), fourteen national parks had been established.[7] The enabling legislation for these parks invariably embodied language such as that appearing in the statute creating Yellowstone National Park, which declared that the area was "dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people . . . ." 16 U.S.C. § 21 (1976).

One part of this pattern was the Act of October 1, 1890, 26 Stat. 650, which the Government cites at page 32 of its brief with something less than scrupulous candor. Despite its title,[8] this statute did not mandate a national forest. Rather it set aside lands which at the time surrounded a California state park comprising the Yosemite valley and which subsequently were incorporated into the Yosemite and General Grant National Parks.[9] Thus, the language in this statute calling for the preservation of "natural curiosities, or wonders" and the protection of fish and game was entirely consonant with Congress' attitude toward the national parks, but hardly relevant to the purposes of national forests.

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[7] These were Yellowstone, Yosemite, Sequoia, General Grant, Mount Ranier, Crater Lake, Wind Cave, Sullys Hill, Mesa Verde, Platt, Glacier, Rocky Mountain, Hawaii, Lassen Volcanic. *See* H.R. Rep. No. 1275, 63rd Cong., 3d Sess. (1915); J. Ise, *Our National Park Policy* at 118 (1961).

[8] It was called, "An act to set apart certain tracts of land in the State of California as forest reservations."

[9] See 21 Cong. Rec. 10752 (1897). *See also* J. Ise, *Our National Park Policy,* at 52-76 (1961).

A universal statement of national park and monument purposes was enacted by Congress as an element of the national park service authorizing statute. 16 U.S.C. § 1 *et. seq.* (1976). This Act declared, in pertinent part, that

> the fundamental purpose of the said parks, monuments, and reservations . . . is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

In adopting this statute, Congress consciously preserved the distinction between national parks and national forests. The House Committee on Public Lands reported:

> It was the unanimous opinion of the committee that there should not be any conflict of jurisdiction as between the departments [of Interior and Agriculture] of such a nature as might interfere with the organization and operation of the national parks, which are set apart for the public enjoyment and entertainment, *as against those reservations specifically created for the conservation of the natural resources of timber and other national assets, and devoted strictly to utilitarian purposes, in the vastly greater areas, known as national forests.*
>
> The segregation of national-park areas necessarily involves the question of the preservation of nature as it exists, and the enjoyment of park privileges requires the development of adequate and moderate-priced transportation and hotel facilities. *In the national forests there must always be kept in mind as primary objects and purposes the utilitarian use of land, of water, and of timber, as contributing to the wealth of all the people.* (Emphasis supplied). H.R. Rep. No. 700, 64th Cong., 1st Sess. 3 (1916).



The same distinction permeated Congressional deliberations on other national park legislation. For instance, the House Report concerning the bill to establish Rocky Mountain National Park presented with approval comments by the president of the American Civic Association. He declared:

> The primary function of the national forests is to supply lumber. The primary function of the national parks is to maintain in healthful efficiency the lives of the people who must use that lumber. The forests are the Nation's reserve wood lots. The parks are the nation's reserve for the maintenance of individual patriotism and Federal solidarity. The true ideal of their maintenance does not run parallel to the making of the most timber, or the most pasturage, or the most water power. H.R. Rep. No. 1275, 63rd Cong., 3rd Sess. 47 (1915).

During debate on this bill, Representative Taylor of Colorado observed:

> . . . our people believe that the grand and rare scenic region, which is one of the most beautiful spots in the entire Rocky Mountains, can be much better administered, protected and developed by the national park service of the Interior Department as a national park than it possibly could be under the Forest Service. Forest reserves are not public playgrounds and they are not administered for recreation places. 52 Cong. Rec. 1791 (1915).[10]

These remarks affirm the Congressional intent to create and operate the national forests for utilitarian purposes.

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[10] In the same exchange, Representative Kent of California, similarly stated:

> It should be dedicated as a pleasure ground and a scenic attraction to all our people, and the difference between its being held under the forest reserve and under the Department of the Interior as a national park is simply this—that

They also reflect the determination of Congress to differentiate these purposes from those served by the national parks. The claims which the United States urges upon this Court should be confined to parks, for to recognize them as forests would erase this distinction to which Congress strictly adhered until enactment of the Multiple Use Act of 1960.

### D. *Administrative Policies Affirm the National Forest Purposes As Protection of Timber and Preservation of Watersheds*

As the Government correctly contends, in instances of ambiguity, courts normally defer to the reasonable statutory interpretations of appropriate administrative agencies. However, the United States chooses to ignore that the practices and policies of the Forest Service, and before it, the Interior Department, in fact refute its claims for reserved instream water rights.

The 1901 Regulations of the Interior Department, then vested with management of the forest reserves, stated:

> Public forest reservations are established to protect and improve the forests for the purpose of securring a permanent supply of timber for the people and insuring conditions favorable to continuous water flow [for the use of appropriators].[11]

*A Primer of Forestry,* by Gifford Pinchot, Forester, published in 1905 by the Department of Agriculture, con-

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as a national park the animal life will be forever free from molestation. Moreover, there will be no question of timber cutting for utilitarian purposes, but the property, which has few available commercial resources, will be held in a state of nature, and for which it is peculiarly adapted. 52 Cong. Rec. 1803 (1915).

[11] *Decisions of The Department of Interior Relating To The Public Lands,* U. S. Department of Interior, at 24 (1901).



tains a similar explanation of the purposes of national forests. It observed:

> The forest reserves lie chiefly in high mountain regions. There are 62 in number, and cover an area (January 1, 1905) of 63,308,319 acres. *They are useful first of all to protect the drainage basins of streams used for irrigation and especially the watersheds of the great irrigation works which the Government is constructing under the Reclamation Law, which was passed in 1902. This is their most important use.* Secondly, they supply grass and other forage for many thousands of grazing animals during the summer, when the lower ranges of the plains and deserts are barren and dry. Lastly, they furnish a permanent supply of wood for the use of settlers, miners, lumberman, and other citizens. This is at present the least important use of the reserves, but it will be of greater consequence hereafter. The best way for the Government to promote each of these great uses is to protect the forest reserves from fire. (Emphasis supplied).[12]

In 1909 the Chief Forester issued a report saying:

> As stated last year, the purposes of national forest administration are (1) protection against fire and trespass; (2) the harvesting of timber when mature, under such limitations as the need of a reserve for future supplies of timber and the need of watershed protection impose; (3) the maintenance and betterment of a growing crop of timber; (4) the protection of the water supply; (5) utilization of the forage crop; (6) betterment of range conditions; and (7) equipment of the property with adequate means of communication and transportation and with neces-

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[12] G. Pinchot, *A Primer of Forestry,* at 86-87, (1905).

sary field quarters, in the interest of more effective protection and increased use.[13]

These pronouncements[14] by national forest administrators disprove the Government's current claims. They affirm that the objectives of the national forest system have been to facilitate timber production and to protect the supply of water for municipal, agricultural, mining, and other uses—the very uses made by Twin Lakes and the District.

## II. THE NATIONAL FORESTS WERE CREATED TO SERVE THE NEEDS OF APPROPRIATORS OF WATER, AND IMPLIED RESERVED RIGHTS SHOULD NOT IMPEDE THAT FUNCTION.

The national forests were established expressly to provide a source of water for irrigators, municipalities and industries. The Organic Administration Act of 1897 extended a clear invitation to appropriators to divert and use water from within the national forests. It said:

> *All waters within the boundaries of national forests may be used for domestic, mining, milling, or irriga-*

[13] *Report of the Forester,* U.S. Dept. of Agriculture, at 70 (1909).

[14] *See* also the report of the Chief Forester in 1913, who articulated national forest purposes as follows:

> The national forests are set aside specifically for the protection of water resources and the production of timber.
>
> . . .
>
> The fundamental aim in administering the national forests is to develop their resources for the permanent upbuilding of the country. The whole object of their administration would be defeated by closing the forests to development and maintaining them as a wilderness. The aim of administration is essentially different from that of a national park, in which economic use of material resources comes second to the preservation of natural conditions on aesthetic grounds. *Report of the Chief Forester,* at 10, 11, U.S. Dept. of Agriculture, (1913).



> *tion purposes, under the laws of the State wherein such national forests are situated,* or under the laws of the United States and the rules and regulations established thereunder. (Emphasis added). 16 U.S.C. § 481 (1976).

In carving the national forests out of the public lands, Congress explicitly granted water for use under either state or federal law.[15] Yet no federal laws concerning national forest water have been passed; no federal rules or regulations have been promulgated. Obviously Congress has been satisfied with the application of state water law to the national forests and the appropriations that law permits.

The implied reservation of water for national forest purposes which is asserted by the Government in this action cannot constrict Congress' express grant of forest water for private appropriators pursuing state law. Indeed, *Arizona v. California,* 373 U.S. 546 (1963), while discerning Federal reserved rights in the Gila River National Forest, clearly did not intend to destroy the water rights of state appropriators in that or any other national forest. Since the Federal claims in the national forest were judged *de minimis,* there was no conflict with or harm to state water appropriations.[16] See Master's Report, *Arizona v. California* at 335.

[15] *See e.g.* 30 *Cong. Rec.* 1006-07, 1399 (1897); S. Doc. No. 105, 51st Cong., 1st Sess. (1897).

[16] The Government contends that New Mexico is collaterally estopped by the Special Master's findings of national forest purposes in *Arizona v. California,* 373 U.S. 546 (1963). This argument is correctly rebutted by the Answer Brief of the State of New Mexico. Twin Lakes and the District commend and adopt New Mexico's position with respect to this issue. At the same time, these *amici* hasten to emphasize that they were not parties to *Arizona v. California, supra,* and that none of the Colorado na-

Other related statutes and administrative policies confirm the United States' determination to aid the development of appropriative water rights in the national forests. The Right-Of-Way Permit Act of 1891, 43 U.S.C. § 946 *et seq.* (1970), the Right-Of-Way Permit Act of 1901, 43 U.S.C. § 959 (1970), and the Forest Right-Of-Way Act of 1905, 16 U.S.C. § 524 (1970), authorized rights of way across national forests and other public lands for ditches to carry water for agricultural, domestic, mining, milling, and electrical power purposes pursuant to state decrees. The Act of June 7, 1924, authorized the purchase and designation as national forests of private lands that would protect "streams used for navigation or for *irrigation* [emphasis added]. . . ." 16 U.S.C. § 570 (1964). In 1940 Congress authorized the President under certain conditions to set aside and specially protect national forest lands needed as sources of municipal water supplies. See 16 U.S.C. § 552(a) (1976).

These statutes have been utilized and relied upon by thousands of appropriators with diversion facilities inside the national forests. Indeed, the construction and operation of diversion systems within the forests would have been impossible without this right-of-way legislation and the implementation thereof by the Forest Service. The

tional forests were considered therein. Twin Lakes and the District consequently urge that any application of the doctrine of collateral estoppel which the Court may entertain in this action be carefully confined to the Gila National Forest.

In a similar vein, the *amici* reject the Government's contention that some significance attaches to the early remarks of New Mexico counsel regarding recreational uses in national forests. The consequences of these remarks would, of course, be limited to the parties to this suit and to the Gila National Forest. However, it should be noted that New Mexico sought leave of court to withdraw its comments and was permitted to argue on the merits of the issue of recreation. The United States was afforded ample opportunity to present its position and could not have been prejudiced by New Mexico's action.



Government now seeks to destroy Congressionally-mandated rights, exercised over decades in good faith by western appropriators, by twisting a doctrine born of implication to ends wholly inconsistent with the clear expressions of Congress.

Until the current reserved rights litigation in the Western states, the Forest Service never exerted any effort to interfere with private or municipal water users. Indeed, it has accommodated private and municipal water appropriations in the forest reserves with special rules. For example, a section of the Forest Service Manual issued in September, 1958, said:

> Action may be taken to insure the protection of watersheds which are important supply sources for municipal, domestic, industrial, or irrigation purposes. Such action may take the form of closure against all forms of use except mining.
>
> Forest Service policy is to restrict entry into or to restrict or prohibit uses of national forest land in municipal or other important watersheds when such action is necessary to safeguard the volume and purity of water supplies and regular flow of streams.[17]

Furthermore, until after 1963 the Forest Service had explicitly and consistently acknowledged the sway of state law over water in the national forests. For example, sections of the Forest Service Manual,[18] issued or amended in January or February, 1960, said:

[17] *Forest Service Manual*, § 2528.3 (1958).

[18] Further manifestations of this policy abound. Thus, in 1936 the Manual directed that "rights to the use of water for national forest purposes will be obtained in accordance with state law." *See Note, Water in the Woods: The Reserved Rights Doctrine in National Forest Lands*, 20 Stan. Law Rev. 1187, 1194 (1968). Wheatley, *Study of the Development and Use of Water Resources in the Public Lands*, Vol. 1, at 206 (1969). A Region

The right of the States to appropriate and otherwise control the use of water is recognized, and the policy of the Forest Service is to abide by applicable State laws and regulations relating to water use.

When water is needed by the Forest Service either for development of programs, improvements, or other uses, action will be taken promptly to acquire necessary water rights.

The rights to use water for national forest purposes will be obtained in accordance with State law. This policy is based on the Act of June 4, 1897 (16 U.S.C. 481) . . .

Departmental authority to secure water rights under State laws is confirmed by the Department of Agriculture Organic Act of September 21, 1944 (58 Stat. 734). [16 U.S.C. § 526 (1976)].

A water right is a right accorded by law to make beneficial use of water. Each State has its own system of laws governing the existence, acquisition, and exercise of water rights. Water-rights systems are highly developed in 17 Western States. They are in an evolutionary stage of development in the

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Five Manual Supplement issued in January, 1947, said that "forest service water uses should be protected by definite water rights obtained from the state." *Region Five Supplement To Forest Service Manual,* Subsection NF-E8-1. Volume 3, Section F of the Manual, issued May, 1953, provided "it is the policy of the Department to obtain water rights under local State laws." *Forest Service Manual,* effective May, 1953, Subsection NF-F4-1. A Manual Supplement issued by Region Two (which includes Colorado) in May, 1956, ordained that "the right to its [water's] continued use shall be secured and safeguarded in compliance with the laws of the state where the water is being diverted or stored. . . ." *Region Two Supplement To Forest Service Manual,* Subsection NF-F4-1.



Eastern States due to increasing demands and locally short supplies. The forest supervisor and others concerned with water rights must have a working knowledge of the law of the particular State as it applies to the source and the existing or intended use of water. He must know the procedure available for contesting proposed uses of water by others which conflict with national forest interests.'[19]

The Multiple Use Act of 1960, 16 U.S.C. § 528 *et seq.* (1976), further reflects the United States' long-standing interest in assisting water appropriators in the natural forests. It provides:

> Section 1 — It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The *purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established* as set forth in section 475 of this title . . . . (emphasis supplied).

The purposes of the 1897 Act were, among others, to protect watersheds so that appropriators would enjoy a steady supply of water, and to ratify the use of national forest water by appropriators under state law. To the extent that reserved rights for recreation, wildlife, fish and other supplemental purposes disrupt and diminish the adjudicated rights of appropriators to forest waters, they would annul the original purposes of the national forest system. Such an upheaval does violence to the meaning and spirit of the Multiple Use Act.

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[19] *Forest Service Manual,* § 2514, 2514.1-2, and 2514.5 (Oct. 1965).

## III. THE RESERVED RIGHTS DOCTRINE HERE DOES NOT ENCOMPASS MINIMUM STREAM FLOWS FOR RECREATION, EROSION AND FIRE CONTROL, AND CERTAIN OTHER PURPOSES PROPOSED BY THE GOVERNMENT.

The United States brief calls for minimum instream flows in order to further an assortment of supposed forest purposes. These purposes are enumerated by the Government as the promotion of recreation, aesthetics, fish, and wildlife, on the one hand, and, on the other, as certain functions that purportedly bear on the capacity of the national forests to produce timber and water — namely erosion control, fire prevention, and watershed protection. (United States brief, pages 12, 22, 29, 30.) As well, at points the Government appears to contend that minimum instream flows represent a forest purpose in their own right. (United States brief, pages 22, 30.)

The recreational, aesthetic and game-development aspects of the national forests have been considered in some detail above. Twin Lakes and the District recognize that the national forests have, in fact, been utilized over the course of decades for their recreational value. Indeed, in any area as vast as the national forests, any number of perfectly lawful, proper activities known to mankind are bound to occur, and this number is also certain to increase as time passes and new frolics gain popularity. For example, skiing, hang-gliding, hot-air ballooning, jeep-touring are a few of the relatively recent pastimes now commonly pursued in Western national forests. These new activities were obviously not contemplated as forest purposes by Congress at the creation of the forest reserves.



At least until the passage of the Multiple Use Act of 1960, recreation did not constitute a purpose of the national forest system. Rather, a remarkably consistent pattern of Congressional and administrative endeavor demonstrates that the national forests were set aside to insure adequate supplies of timber and water to aid the development of the nation. In *Cappaert, supra,* the Court exercised care in emphasizing that implied reserved rights are narrowly restricted to only the amount of water required to implement the purposes for which the federal reservations in question were created. That need is established by reference to the amount of water required as perceived at the creation of the reservation. Until 1960, recreation and related functions exceeded anything contemplated by Congress as the basis for authorizing the creation of national forests. By demanding reserved rights for an ever-expanding array of incidental forest uses, the Government is seeking to distort this doctrine from this Court's careful holding in *Cappaert, supra.*

The United States also seems to envision minimum stream flows as a forest purpose in and of themselves. This view reflects a fundamental confusion about the meaning of the statutory phrase "for the purpose of securing favorable conditions of water flows . . . ." 16 U.S.C. § 475 (1976). The legislative history of the Organic Act shows that Congress did not have minimum stream flows in mind when it framed that particular language. It did not thereby mean to say "for the purpose of securing minimum water flows in streams throughout the national forests," which would have comprised a quite different purpose from what it did actually mandate. Congress's concern, rather, was to conserve the capacity of forested uplands to retard spring snow melts, absorb sudden rainfalls, and prevent both floods and droughts in regions of the country renown for their extreme weather. This interest pervades the statements of Congressmen and of federal administrators concerning the

Creative and the Organic Acts,[20] and it is even acknowledged here by the United States (United States brief, pages 37-39).

Moreover, both the Congress and federal agencies have taken pains to avail forest waters to appropriators for diversion within the boundaries of the national forests.[21] This legislation rebuffs the current efforts of the Government to divine purposes where none existed. It is simply inconceivable that Congress would have expressly encouraged farmers, miners, cities and others to enter, and use and channel water away from the heart of the national forests if it had entertained any desire to preserve or even promote the uninterrupted flow of streams down and through these woodlands.

The United States has also conjured up a need for minimum stream flows to stem erosion, control fires, and,

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[20] For instance in 1891, the Interior Department observed:

> it is of the first importance to reserve all public lands in mountainous and other regions which are covered with timber or undergrowth at the headwaters of rivers and along the banks of streams, creeks, and ravines, where *such timber* or undergrowth is the means provided by nature *to absorb and check the mountain torrents and to prevent the sudden and rapid melting of the winter's snows and the resultant inundation of the valleys below, which destroy the agricultural and pasturage interests of communities and settlements in the lower portions of the country.* (emphasis supplied).

Department of the Interior, Circular to Special Agents of the General Land Office, dated May 15, 1891 (reproduced at 29 Cong. Rec. 2514 (1897)). *See also* 22 Cong. Rec. 3616 (1890); Senate Doc. No. 105, 55th Cong., 1st Sess. 36 (1897).

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[21] *See e.g.* 16 U.S.C. § 481 (1976); the Right-of-Way Permit Act of 1891, 43 U.S.C. § 946 *et seq.* (1970), the Rights-of-Way Permit Act of 1901, 43 U.S.C. § 959 (1970), and the Forest Rights-of-Way Act of 1905, 16 U.S.C. § 524 (1976).



in addition, apparently to protect watersheds in ways which it fails to describe. (United States brief, page 12, 22). These particular claims represent a new departure for the United States in reserved rights litigation. They were not raised in this case prior to the appellate stages, just as they were not raised in the companion Colorado reserved rights suit.

All parties recognize that national forest purposes include the conservation of timber and the protection of watersheds. Fire prevention and erosion control are necessary to the fulfillment of these purposes. Yet the record in this case is completely bare of any evidence that minimum stream flows play any role whatsoever in serving these functions.[22] These claims are simply unsupported by even the most meager shred of evidence in this case. They reflect nothing other than the inventiveness of counsel bereft of the proof necessary to sustain their position. Indeed, the most fleeting exposure to the national forests tends to dispel these contentions. The United States suggests that without minimum flows the national forests will be ravaged by destructive fires and reduced to a rutted, smoldering wasteland. (United States brief, page 12). Yet even the most casual visitor to the natural forests will testify that they generally exist in a thoroughly sound condition. Somehow, over the course of the past eighty-seven years, despite the absence of federal reserved rights for minimum stream flows, the national forests have not only managed to survive, but also to flourish.

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[22] Most national forest streams attain a width of only a few feet, and would constitute highly ineffectual barriers to combat fires. The Idaho Supreme Court in *Avondale Irrigation District v. North Idaho Properties, Inc., supra* at pp. 16-22, correctly applied a strict standard of proof to such minimum stream flow claims.

## IV. THE UNITED STATES IS VESTED WITH FULL AUTHORITY TO REALIZE ITS NEW GOALS WITHOUT DAMAGING EXISTING WATER USERS IN THE NATIONAL FORESTS.

If the Government now regrets the existence of private and municipal water diversion projects on national forests, it should exercise its powers of eminent domain to purchase and extinguish private and municipal water rights. Surely a federal environmental goal of the magnitude inherent in the Government claims is worthy of the federal purse.

Moreover, the Government is already equipped with an effective statutory tool to enforce the non-use of scarce water resources. The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq.* (1970), repealed all prior right-of-way statutes relating to the national forests. *See* 43 U.S.C. § 1701 (1970). In their place, the Act substituted a statutory scheme granting the Secretary of Agriculture discretion in permitting rights-of-way through the national forests, and discretion in imposing environmental and other restrictions on those rights-of-way which he does choose to authorize. 43 U.S.C. § 1761-66 (1970). This statute equips the United States with the power to regulate any further diversions of water from within the national forests and thereby to maintain whatever minimum stream flows it deems advisable in the forests.

This statutory authority reveals the true nature of the Government's claims here for reserved rights for minimum stream flows. They are not necessary for the future viability of the national forests, because the United States already enjoys the wherewithall to satisfy that goal. Rather, this is an enterprise aimed at depriving established appropriators of water rights which they have exercised for decades, heretofore with the cooperation and encouragement of the United States. The Government's case repre-



sents an effort to confiscate rights for which it is unwilling to provide just compensation.[23]

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[23] In Colorado, the United States has pursued a less than consistent policy in developing minimum stream flows. A Colorado state agency, the Colorado Water Conservation Board, is authorized to seek and obtain rights to minimum stream flows pursuant to Colorado law. See 37-92-102 (3) and 37-92-103 (4), C.R.S. 1973. In fact, this agency has undertaken a vigorous effort to secure such flows. In numerous recent applications affecting national forest streams, however, the United States has opposed the Colorado Water Conservation Board's claims for minimum stream flows. Evidently, the United States' interest is directed less at establishing minimum stream flows than in promoting its own perceived exclusive rights to water on national forests.

## CONCLUSION

Twin Lakes and the District respectfully request the Court to affirm the decision of the New Mexico Supreme Court and deny the claims asserted by the United States for minimum instream flows.

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